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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

AUG 12 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of

Streamlining Broadcast EEO)
Rules and Policies, Vacating)
the EEO Forfeiture Policy)
Statement and Amending Section)
1.80 of the Commission's Rules)
to Include EEO Forfeiture Guidelines)

MM Docket No. 96-16

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REPLY COMMENTS of Americans United for Separation of Church and State,
the American Civil Liberties Union, People for the American Way, and
the Office of Communication of the United Church of Christ,
to the Comments of the Christian Legal Society's Center for Law and
Religious Freedom and the National Religious Broadcasters

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August 12, 1996

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to the Comments of the Christian Legal Society's Center for Law and
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Introduction and Summary

Americans United for Separation of Church and State, the American Civil Liberties Union, People for the American Way, and the Office of Communication of the United Church of Christ, submit the following Reply Comments in the above-captioned proceeding.

Although the Commission did not request Comments regarding its equal employment opportunity ("EEO") policies with respect to religious discrimination, the Christian Legal Society's Center for Law and Religious Freedom ("CLS") and the National Religious Broadcasters ("NRB") submitted Comments urging the Commission to amend its current EEO policy to provide that a "religiously affiliated broadcaster may prefer individuals of a particular faith in employment in all of its activities."¹ These Reply Comments are intended to reaffirm the Commission's current EEO policy which allows a religious broadcaster to

¹ Comments of the Christian Legal Society, MM Docket No. 96-16 (filed July 1, 1996).

prefer members of its own faith only in those positions that are directly connected with the espousal of the broadcaster's religious philosophy over the air.

First, religious broadcasters, unlike other religious organizations, are granted the benefit of an FCC license to act as public trustees. A broadcast license is essentially a privilege to use the publicly-owned airwaves in return for the duty to serve the public interest. As public trustees, the government has subjected broadcasters to regulation that would not be permitted outside the broadcast context. Therefore, although Title VII permits a private religious organization to make employment decisions on the basis of religion, the Commission has the authority to consider any employment discrimination when determining whether to renew a broadcaster's license to use a publicly-owned television or radio frequency.

In actuality, the rule espoused by CLS and NRB would exceed current law by allowing commercial broadcasters to discriminate in their employment on the basis of religion. Current law only applies to the nonprofit activities of religious employers. The amendment of the Commission's rules sought by CLS and NRB would therefore violate what is currently permitted under Title VII.

Finally, as public trustees, broadcasters commit to promoting diversity and eradicating employment discrimination in the broadcast industry. The Commission's current rules strike a careful balance between religious free exercise rights and the "public interest" in promoting increased access to broadcast industry opportunities for all Americans. The expansion of the religious exemption proposed by CLS and NRB could disrupt this balance

and impair the Commission's efforts to promote civil rights and diversity in the broadcast industry.

Discussion

A. Broadcasters are public trustees and are therefore subject to government regulation.

The Supreme Court has held that radio and television broadcasters are subject to government regulations that may not be permitted of other entities. For example, under limited circumstances, the Court has held that the Commission can regulate expression over the broadcast media based on the content of the speech.² Such limitations on First Amendment protection is a result of the Commission's ability to grant or to deny broadcast licenses based on "the public interest, convenience and necessity."³ Therefore, the First Amendment has been interpreted to permit the government to impose regulations on broadcasters who are considered to be public trustees for the airwaves.⁴ Further, as public trustees, religious broadcasters have a responsibility to the community beyond that of private religious institutions. Indeed, unlike purely private religious organizations, such as houses of worship, religious broadcasters have chosen to step into the role of a government licensed public trustee.

Accordingly, all broadcasters, including religious broadcasters, are subject to

² *Federal Comm. Comm'n v. Pacifica Found.* 438 U.S. 726 (1978).

³ *Id.* at 748.

⁴ *See Red Lion Broadcasting Co. v. Federal Comm. Comm'n*, 395 U.S. 367 (1969).

government oversight and regulations of their broadcast stations. Broadcasters, in order to obtain a license to utilize the airwaves, must abide by their pledge, as an FCC licensee, to uphold the public interest in the operation of their stations. This "public interest" includes promoting equal opportunity and diversity in broadcast employment. In this case, limiting a broadcaster's ability to discriminate on the basis of religion only against employees who are involved with the espousal of religious views is not an additional burden on religious broadcasters, but a uniform requirement of all public trustees to act in the public interest. The current EEO rules achieve this balance between religious free exercise rights and the "public interest."

B. A "bright-line rule" allowing religious discrimination by all religious broadcasters exceeds current law.

The CLS and NRB Comments urge the Commission to adopt a new "bright-line rule"⁵ requiring that all religious broadcasters, including those with commercial stations, be permitted to discriminate on the basis of religion in their employment for all jobs, including those not related to the espousal of the broadcasters' religious views. Their stated rationale for this new rule is to "follow the lead" of the 1972 amendment to Title VII of the Civil Rights Act of 1964 ("Title VII"),⁶ as interpreted by the U.S. Supreme Court in 1987.⁷ This

⁵ Comments of National Religious Broadcasters, MM Docket No. 96-16 (filed April 30, 1996).

⁶ 42 U.S.C. sec. 2000e-1. The amendment exempted religious organizations from Title VII's prohibition against religious discrimination in any employment. Prior to Congress's amendment, Title VII's exemption applied only to employees who performed "work connected with the carrying on by [the organization] of its activities "

rationale is flawed and fails to acknowledge the limited scope of the 1972 amendment to Title VII as interpreted in *Amos*. Additionally, the CLS and NRB Comments ignore the distinction between Title VII, which is a civil remedy for the deprivation of a statutory right, and the Commission's EEO rules, which are regulations governing a public trustee who is granted a federal license.

In *Amos*, the Supreme Court held that the expansion of the religious exemption in Title VII did not violate the religion clauses of the First Amendment.⁸ The Court, however, took special care to emphasize that the holding was limited to the nonprofit activities of religious employers.⁹ In fact, several Justices emphasized that their decision did not address profit-making activities conducted by religious organizations.¹⁰

The Court's distinction between nonprofit and commercial activities of religious employers was not mentioned in either the CLS or the NRB Comments. However, there are certainly religious broadcasters that operate commercial stations.¹¹ The amendment to the Commission's EEO rules sought by CLS and NRB would nevertheless include these commercial stations and allow them to discriminate in the hiring of all of their employees on

⁷ *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987).

⁸ *Id.* at 340.

⁹ *Id.*

¹⁰ *Id.* at 341 (Brennan, J. and Marshall, J., concurring), 347 (Blackman, J., concurring), 350 (O'Connor, J. concurring)

¹¹ See *In re Applications of the Lutheran Church/Missouri Synod*, MM Docket No. 94-10.

the basis of religion. This "bright-line rule," therefore, would exceed even what is permitted under Title VII.¹²

C. Expansion of the religious exemption could seriously impair efforts to promote civil rights and diversity in the broadcast industry.

As stated above, an expansion of the religious exemption could impair the Commission's efforts to promote civil rights and diversity in the broadcast industry. Broadcasters could claim that the pool of qualified applicants for non-broadcast related jobs is limited to members of a particular faith. This could lead to a considerable negative impact on equal opportunity in the industry, as people could be shut out of the opportunity to obtain valuable training and experience at religiously-owned broadcast stations.

As Congress and the Commission have recognized, "the effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the medium of mass communications."¹³ Measures to promote nondiscrimination and recruitment of minorities in the broadcast industry are also important to enable the Commission to fulfill its obligation under the Communications Act of 1934 to promote diversity of programming.¹⁴ The significant change in the Commission's

¹² For the reasons stated sections A and C of these Reply Comments, special considerations exist for public trustees and the Commission's policy with respect to diversity of the broadcast industry that support the decision to prohibit religious, as well as other forms of discrimination. Accordingly, the Commission has the authority to retain its current rules with respect to discrimination on the basis of religion

¹³ H.R. Conf. Rep. No. 97-765, p. 43 (1982).

¹⁴ See *NAACP v. Fed. Power Comm'n*, 425 U.S. 662, 670, n. 7 (1976); FCC Minority Ownership Task Force, Report on Minority Ownership in Broadcasting (1978).

policy sought by CLS and NRB could seriously impair achievement of these objectives and should be rejected.

Conclusion

For the aforementioned reasons, we urge the Commission to reject the changes to the religious discrimination provisions of the EEO rules sought by CLS and NRB.

Respectfully submitted,



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